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Mr. Chairman and members of the Committee, I am General Counsel of Automattic and I appreciate the opportunity to speak with you today about our experience with the notice and takedown provisions of the DMCA. From our point of view, the DMCA process works well overall, but we have also seen first hand how some shortcomings of the current system burden important rights of free expression online and create real costs for companies like Automattic.

About Automattic

Automattic is a small company that has a big impact on the internet. We're best known as the company behind WordPress, the most popular and fastest growing publishing platform on the internet. Our WordPress.com service allows anyone to create a website, for free, in minutes. It has proved very popular: Automattic now hosts more than 48 million websites on WordPress.com, which range from some of the largest media properties in the world to small personal and family blogs. Our sites attract approximately 400 million visitors and 13.1 billion page views each month. Automattic is able to reach this huge audience with only 231 employees (including only one lawyer), all of whom work in a distributed environment: Automattic employees live in more than 25 US states and almost 30 countries around the world. We work, collaborate and socialize in an online "office" that's busy 24 hours a day.

Automattic and the DMCA

Our users publish a massive amount of content to the websites on our network. The vast, vast, majority of this content is original work and not subject to any copyright infringement claims. Let me illustrate with some recent data. Last month (February 2014) WordPress.com users created more than 740,000 new websites, made almost 39 million posts to their blogs and websites, and uploaded more than 22 million individual files (which include photos, videos, songs) in the process¹. In that same month, we received 825 individual DMCA takedown notices - or about one DMCA notice for every 46,000 posts made to a WordPress website.

Though we don't see large scale copyright infringement on our platform, we fully appreciate and support the rights of copyright creators online. We're especially attuned to the rights of small, independent creators who make up the bulk of our user base and create troves of their own, original copyrighted content on WordPress.com everyday. As such, we devote a considerable amount of resources to addressing the copyright infringement claims that we do receive, and take great care to comply with our obligations under the DMCA's notice and takedown system.

From our perspective, the DMCA's notice and takedown system generally works in practice. The safe harbor provisions of the law are very important to us, and we, like hundreds of other internet service providers, rely on them in publishing the huge amount of online content that our users create. The DMCA provides important certainty that our hosting of user generated content will not lead to costly and crippling copyright infringement lawsuits.

To comply with our notice and takedown obligations, we have a team of seven people who focus on DMCA and copyright issues as part of their jobs. We aim to respond to all inbound DMCA requests within 48 hours, be fully transparent with all parties about the actions we're taking, and make the process of submitting DMCA notices and counter notices as simple and straightforward as possible.

¹ Further statistics on the usage of the WordPress publishing platform may be found at <http://wordpress.com/stats>

Having one in house lawyer (me) and this small team to address copyright issues puts us miles ahead of the majority of internet startups who are much smaller than Automattic, but who are also subject to the same DMCA regulations. I'd like to stress that a portion of the resources we put towards our DMCA program are aimed at combating the shortcomings of the notice and takedown system. For example, we spend significant effort reviewing and trying to weed out overbroad and abusive DMCA takedown notices, so that our users' speech isn't needlessly censored. This is a real cost to us, and diverts resources from more productive uses, like improving the products and services we offer our customers.

Though the system generally works in practice, we see, first hand, several shortcomings with the DMCA's copyright enforcement system.

In particular, the DMCA doesn't adequately protect important fair uses of content online and doesn't provide a level playing field for individuals who want to counter takedown notices they receive against their content. Importantly, the system fails to penalize abusive and fraudulent DMCA takedown requests. I can attest to how these flaws in the DMCA system place real burdens on us as an internet service provider, and more importantly, on the free expression rights of the many individuals who trust our services to help them run businesses, publish journalism or express their voices to the world.

DMCA Abuse

At Automattic, we've seen an increasing amount of abuse of the DMCA's takedown process. The DMCA's takedown process provides what can be an easy avenue for censorship: simply send in a DMCA notice claiming copyrights in a piece of content that you don't agree with. Regardless of whether you own the copyright, the service provider that hosts the content must take it down or risk being out of compliance with the DMCA.

Recent cases of abuse have been well documented. For example, we recently filed an amicus brief in support of Stephanie Lenz's lawsuit against Universal Music Group². In that case, Ms. Lenz posted a home video of her young child dancing in their family kitchen to a song by the artist Prince. Soon after posting, Universal Music (Prince's record label) sent a DMCA takedown notice to remove the video, claiming it infringed on their copyright in the music playing in the background.

In our amicus brief, we, along with the internet companies who joined us, outlined many other recent examples of misuse of the DMCA that we've seen on our respective platforms. For example:

- A medical transcription training service using forged customer testimonials on their website submitted a takedown for screenshots of the fake testimonials in a blog post exposing the scam.
- A physician demanded removal of newspaper excerpts posted to a blog critical of the physician, by submitting a DMCA notice in which he falsely claimed to be a representative of the newspaper.
- A model involved in a contract dispute with a photographer submitted a series of DMCA notices seeking removal of images of the model for which the photographer was the rights holder.
- An international corporation submitted DMCA notices seeking removal of images of company

² Full text of our amicus brief available at https://www.eff.org/files/2013/12/13/osp_lenz_amicus_brief.pdf

documents posted by a whistleblower.

- A frequent submitter of DMCA notices submitted a DMCA notice seeking removal of a screenshot of an online discussion criticizing him for submitting overreaching DMCA notices.

But it was two recent cases of on WordPress.com that really opened our eyes to the issue of abuse.

First: Ivan Oransky and Adam Marcus are experienced science journalists who operate Retraction Watch (retractionwatch.com), a WordPress.com site that highlights and tracks situations where published scientific papers may not be everything they seem. One reader apparently disagreed with a critique published on Retraction Watch - so he copied portions of the Retraction Watch site, claimed the work as his own (by backdating his site to make it appear to be the original publisher) and issued a DMCA takedown notice against the true authors. Relying on the representations of copyright ownership in the DMCA notice, we processed the notice and disabled Retraction Watch's original content. Retraction Watch promptly filed a counter notice, but their content stayed down for a period of 10 days: the time period mandated by the DMCA, even after the legitimate publisher submits a valid counter notice.

Second: Oliver Hotham is a student journalist living in the UK. Oliver publishes investigative articles on his WordPress.com blog (oliverhotham.wordpress.com). The subject of one of his articles apparently had second thoughts about a press statement he gave to Oliver - so he turned to copyright law to censor Oliver's site. He submitted a DMCA notice to Automattic claiming copyrights in the press statement that he issued. We processed the DMCA notice and Oliver's post was removed. Oliver did not feel comfortable submitting to the jurisdiction of a US court and so the post remains disabled today.

These abuses inspired us to join with our users to take action. In November, 2013, Automattic, along with Oliver, Ivan, and Adam filed two lawsuits for damages under Section 512(f) of the DMCA, which allows for suits against those who "knowingly materially misrepresent" a case of copyright infringement³.

While there are statutory damages for copyright infringement (even if very minor) there are no similar damages, or clear penalties of any kind, for submitting a fraudulent DMCA notice. The lawsuits that we filed represent the only recourse for abuse of the DMCA takedown process. The lawsuits were expensive to bring, time consuming to prosecute, and promise very little in the way of compensation in return. We brought these lawsuits, alongside our users, to protect their important free speech rights and send the message that abuse of the DMCA process has consequences (at least on WordPress.com). Cases like these are extremely rare, and I'm confident in saying that the users would not have the time, resources or sophistication to bring the suits on their own.

The DMCA system gives copyright holders a powerful and easy-to-use weapon: the unilateral right to issue a takedown notice that a website operator (like Automattic) must honor or risk legal liability. The system works so long as copyright owners use this power in good faith. But too often they don't, and there should be clear legal consequences for those who choose to abuse the system. I'd urge the

³ *Automattic Inc., et al v. Steiner*, No. 13-cv-5413 (N.D. Cal. Nov.21, 2013), and *Automattic Inc., et al v. Chatwal*, No. 13-cv-5411 (N.D. Cal. filed Nov.21, 2013).

Committee to add such penalties to the DMCA to deter and punish these types of abuses.

Fair Use

Another shortcoming we see in the current takedown regime is an inadequate protection for fair use of copyrighted materials.

The fair use doctrine allows for limited use of another's copyrighted works and underlies a significant amount of the content that's posted to WordPress.com, and across today's social internet. Anytime a blogger uses a portion of a copyrighted book in a book review, or incorporates a screenshot of a company's website in a criticism of that company's products, fair use is at play. This happens thousands of times across the internet and on WordPress.com each day. Fair use is fundamental to the sharing we see on WordPress.com and across the modern, social internet. Anyone has the ability to be a creator and creation on the internet often starts with fair use of another copyrighted work. Without fair use, sharing, creativity and conversation on the internet would be much less interesting and robust.

Unfortunately, fair uses are often the target of DMCA takedown notices. Many times, fair uses are unintentionally targeted by copyright holders (or their third party agents) who simply scan the internet for copyrighted images or text, and issue bulk takedown notices against files that match their database of materials, without regard to how those materials are used. Without adequate, human reviews, to determine if a copyrighted file is being legitimately and fairly used, such bulk notices can create significant collateral damage to freedom of expression. Even more concerning are companies who issue DMCA notices specifically against content that makes use of their copyrighted material as part of a criticism or negative review - which is classic fair use.

The damage done by takedown notices that target fair use is exacerbated by the fact that the counter notice system doesn't work for most internet users (more on that issue below). The end result is that there isn't an effective way, under the current system, for a user on the receiving end of a faulty notice to challenge the removal of their content and have it reinstated.

The DMCA's notice and takedown system should do a better job of taking account of fair use rights. There should be real requirements for copyright holders to consider fair use and meaningful penalties for those who abuse the DMCA takedown process by targeting fair uses of their works.

Counter Notices

To fight back against the faulty, overbroad, or fraudulent DMCA notices I described above, the DMCA provides that a user may challenge the removal of content by filing a counter notice. In our experience, however, this happens very rarely. In February 2014, we received 825 DMCA notices and only 4 counter notices. Other online services report similar statistics.⁴

One key deterrent to contesting a takedown notice is the prospect of statutory damages for infringement. Statutory damages mean that plaintiffs in copyright cases don't have to present any

⁴ Twitter, for example, reported receiving more than 5,500 takedown notices over a six month period from January-June 2013. But in that time, it received only six counter notices challenging removal of content. <https://transparency.twitter.com/copyright-notices/2013/jan-jun>

evidence that they were harmed in order to receive a damages award. This makes damages for infringement highly unpredictable, and in many cases, far out of proportion to the damages caused by an innocent, non-commercial infringement of copyright. Statutory damages represent a deterrent to creativity on the internet, and prevent many internet users from contesting takedown notices against copyrighted content that they had every right to use and publish.

Another deterrent is that the counter notice form itself is complicated and legalistic - many users need to consult a lawyer before completing and submitting the form, and most don't have the time or resources to do that.

Additionally, in the process of submitting a counter notice, users are required to reveal their personal identity and address and agree to be sued in federal court. This doesn't work for the many anonymous bloggers that we host on WordPress.com, who speak out on sensitive issues like corporate or government corruption.

All these factors make filing a counter notice an uphill and potentially very expensive battle. The unfortunate result of this takedown notice power differential is that a massive amount of content is being permanently removed from the internet, even though much of it is lawfully and fairly used.

To address these issues, we should re-examine statutory damages in light of how copyrighted content is being used and shared by individual users on today's internet. Also, the counter notice process can be streamlined and improved.

Conclusion

When the DMCA originally passed in 1998, it wasn't possible to create a Facebook page, Twitter account or your own website, for free, in minutes like you can do on WordPress.com. These innovative tools allow anyone to communicate their vacation photos to the world, build a business as an independent publisher, or even organize a democratic, grass roots overthrow of an oppressive regime in the Middle East. The internet's communication and sharing tools are used by millions of people, and all grew up under the DMCA. For the most part, the statute has worked to encourage the growth of innovative platforms and businesses. The United States is now home to the most thriving and advanced internet companies in the world.

At the same time, there are some important flaws in the DMCA takedown process. Particularly, the DMCA doesn't adequately protect fair use rights that are a key driver of the growth of the modern social internet. Also, the DMCA doesn't provide average internet users or service providers adequate protections against abuse of the notice and takedown system - though copyright law does impose draconian statutory damages for even minor infringements.

From the point of view of the service provider, the safe thing to do is to process all DMCA takedown notices that we receive, without reviewing them for abuse or thinking about the possibility of fair use defenses. The DMCA provides an attractive legal safe harbor for service providers if we follow the takedown process to the letter. Unfortunately, this process puts the full onus on the user to assert their legal rights to content and very often, they choose not to do so because of the risks and expense involved. At Automattic, we do our best to review the takedown notices we receive and in some cases, question and push back on takedown demands that we see as outright abuse or clearly targeting a fair use of copyrighted content. The problem is that each time we question a DMCA notice, or delay our

processing of it to investigate further, we risk stepping outside of the DMCA's safe harbors and subjecting ourselves to a possible infringement claim.

In short, the copyright problem we see on WordPress.com isn't that too little copyrighted content is being removed from the internet. Instead, the huge amount of legitimate, user generated, original content we see on our platform has led to instances of overbroad copyright enforcement, as well as outright abuse of the DMCA. These flaws and abuses have the effect of limiting freedom of expression and we should all do our best to try to correct and prevent them.

Our users are small, independent creators, amateur journalists and publishers of all types. A large and growing number of them are located outside of the United States. Many of these individuals do not enjoy freedom of expression in their home countries, but they're able to find it on WordPress.com and on hundreds of other US based services on the internet - all of which are subject to the provisions of the DMCA. We're very proud of the platform that we've created, and of the creators who are able to express their voice through our services. I'd urge the Committee to keep Automattic and our community of creators in mind as we think about the laws governing copyright on the modern internet.

Thank you again to the Committee for the opportunity to share my views on these important issues and I look forward to your questions.

Paul Sieminski is General Counsel for Automattic Inc., the company behind WordPress.com. As General Counsel, Paul oversees Automattic's global legal affairs, including copyright and intellectual property enforcement and policy. Paul received his B.S. in Business Administration from Georgetown University and law degree from the University of Virginia School of Law.